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After *Tel-Oren*: Should Federal Courts Infer a Cause of Action Under the Alien Tort Claims Act?

I. Introduction

In 1789 Congress passed the Alien Tort Claims Act (ATCA),¹ a federal jurisdictional statute that currently bears the dubious distinction of having been successfully invoked only three times in almost two centuries.² Although the statute has endured, its meager legislative history fails to cast clear light on the reasons it was enacted. Federal district courts have accordingly shied away from exercising original jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."³

ATCA is presently the focus of considerable judicial analysis in human rights litigation.⁴ A recent case is *Tel-Oren v. Libyan Arab Republic*,⁵ in which the District of Columbia Court of Appeals attempted to determine whether ATCA requires aliens to plead and prove a cause of action⁶ that is separate and distinct from the statute before they can seek redress for tortious violations of the law of nations.⁷ The *Tel-Oren* court did not reach a consensus on this issue,

1. The 1789 version, in relevant part, declares:

And be it further enacted, That the district courts . . . shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis in original). The Act, as amended, can be found in 28 U.S.C. § 1350 (1982). See also *infra* note 3 and accompanying text (modern version of ATCA).

2. See *infra* text accompanying notes 26, 50 & 59.

3. 28 U.S.C. § 1350 (1982). This Comment centers on the "law of nations," rather than the "treaty," portion of ATCA.

4. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3617 (U.S. Feb. 26, 1985) (No. 83-2052); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

5. 726 F.2d 774 (D.C. Cir. 1984).

6. When a plaintiff has a cause of action, he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 801 (quoting *Davis v. Passman*, 442 U.S. 228, 240 n.18 (1979)). This Comment uses "cause of action" and "right to relief" synonymously.

7. There exists considerable confusion about the definitions of "international law," "law of nations" and "treaty." For the purposes of this Comment, the following definitions are utilized. "International law" is "the body of general principles and specific rules which are binding upon the members of the international community in their mutual relations." C. FENWICK, *INTERNATIONAL LAW* 31 (4th ed. 1965). International law encompasses the law of na-

and the resultant plurality decision has only perpetuated the dilemma.⁸ Given recent attempts to use ATCA as an avenue to obtain relief for human rights violations,⁹ federal courts are in need of a clear standard enabling them to determine if resort to this statute is appropriate.

This Comment, consisting of three main parts, examines the cause of action issue as it arose in *Tel-Oren* and places it in the context of ATCA's prior history. The first part focuses on the three instances in which a federal court has used the statute to exercise jurisdiction in an alien tort action. The second part examines the *Tel-Oren* case, centering on two of three concurrences forming the District of Columbia Court of Appeals' decision. The third part suggests that proving a distinct cause of action embodied in the law of nations is not necessary to utilize ATCA. Rather, a method of statutory construction is proposed that enables courts to infer a right to relief pursuant to ATCA itself. After examining relevant case law and policy, this Comment concludes that inferring a cause of action under ATCA is desirable. An analytical framework is then proposed to facilitate judicial attempts to make the necessary inference.

II. Emergence, Decline, and Resurgence of ATCA

A. Emergence

Like the English legal system from which it is descended, federal common law has long embodied the law of nations.¹⁰ In its earliest form, however, this "universal" law was not yet subdivided into the public and private systems of rights and obligations that later gained popularity in the nineteenth century.¹¹ Rather, the law of nations "was concerned somewhat indiscriminately with matters between individuals, between individuals and states, and between states."¹² When individual rights were violated, criminal penalties

tions and treaties, which may be distinguished as follows: "Unlike the law of nations, which enables each state to make an independent judgment as to the extent and method of enforcing internationally recognized norms, treaties establish both obligations and the extent to which they shall be enforceable." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 778 n.2 (Edwards, J., concurring).

8. Circuit Judge Edwards began his *Tel-Oren* concurrence by stating:

This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.' As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.

Tel-Oren v. Libyan Arab Republic, 726 F.2d at 775 (Edwards, J., concurring).

9. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 823 (Bork, J., concurring) (ATCA is "generating an increasing amount of litigation").

10. J. BRIERLY, *THE LAW OF NATIONS* 86 (1963); J. KENT, *COMMENTARIES ON AMERICAN LAW* 185 (1867); Dickinson, *The Law of Nations As Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952).

11. See *infra* notes 40-43 and accompanying text.

12. Dickinson, *supra* note 10, at 27.

were not the exclusive judicial sanction.¹³ Civil remedies were also available,¹⁴ and, soon after the Confederation became a nation, ATCA was created to allow aliens to pursue tort claims in federal district courts.¹⁵

When an alien suffers a tort committed in violation of the law of nations or United States treaty, ATCA confers subject matter jurisdiction without requiring diversity of citizenship or a minimum amount in controversy.¹⁶ The precise reasons for this special grant are unclear, but it appears ATCA was enacted to enable alien tort claimants to seek redress in a federal forum, thereby minimizing the chance of international conflicts that might arise if the suit were litigated in a state court.¹⁷ Of central concern to ATCA's framers was the need to place international relations under federal control.¹⁸ By erecting uniform governmental mechanisms to regulate foreign policy, the new nation improved its chances of interacting effectively with other sovereigns.

If thirteen state judicial systems were to adjudicate alien tort claims, standards of liability would vary considerably. This inconsistency would create the impression that the new union was not as united as its name declared.¹⁹ Moreover, an erroneous judgment could plunge the nation into international conflict, possibly resulting in war. Emmerich de Vattel, a jurist well-known to ATCA framers, warned of this potential catastrophe.²⁰ He noted that a sovereign refusing to redress civil wrongs committed by its citizen upon an alien was often perceived as "an accomplice in the injury,"²¹ ultimately responsible for the harm done.²² Refusal to bring the offender to justice was considered a ratification of the wrongful act and an offense against the alien's nation.²³ The framers were therefore well aware of the need for federal judicial control in matters of foreign policy.²⁴ John Jay discussed the matter in *Federalist No. 3*:

13. *Id.* at 29.

14. *Id.*

15. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 782 (Edwards, J., concurring); *id.* at 812 (Bork, J., concurring).

16. *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966). See generally Comment, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L. REV. 105 (1979) (pre-*Tel-Oren* discussion of ATCA).

17. See *supra* note 15 and accompanying text.

18. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 782 (Edwards, J., concurring); M. FARRAND, *THE FRAMING OF THE CONSTITUTION* 50 (1974); see *THE FEDERALIST* No. 3, at 43 (J. Jay) (Mentor ed. 1961).

19. *THE FEDERALIST* No. 3, at 43 (J. Jay), No. 80 at 476 (A. Hamilton) (Mentor ed. 1961).

20. E. VATTEL, *THE LAW OF NATIONS* 161-63 (Chitty ed. 1849).

21. *Id.* at 163.

22. *Id.* at 162-63.

23. *Id.* at 162.

24. See *supra* text accompanying note 18.

Under the national government, treaties and . . . the laws of nations . . . will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent [due to] the variety of independent courts and judges appointed by different and independent governments [and] the different local laws and interests which may affect and influence them. The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.²⁵

Jay echoed the attitude of many who enacted ATCA. The statute is essentially a manifestation of Congress' desire to minimize the chances of foreign conflict arising from an alien tort action.

The first case to invoke jurisdiction under ATCA was *Bolchos v. Darrel*,²⁶ decided in 1795. When the parties came before the district court, England and Spain were at war with France.²⁷ Plaintiff Bolchos, a French privateer, captured a Spanish vessel and brought it into port in South Carolina. On board the ship were slaves owned by a Spaniard and mortgaged to an Englishman. Defendant Darrel, an agent of the English mortgagee, seized the slaves and sold them. Bolchos initially brought an action in state court, but the case was dismissed because it properly rested within the district court's admiralty jurisdiction.²⁸ The district court found it had authority to decide the case for two reasons. First, given the state court dismissal, a "failure of justice"²⁹ would occur if a federal court refused to hear the case. Second, ATCA provided an alternative justification for taking cognizance of the dispute.³⁰

The court's holding is best analyzed in light of a treaty the United States executed with France.³¹ The case clearly had significant political ramifications since three other sovereigns would carefully observe the decision. The court stated that the law of nations would normally require the slaves to be returned to their neutral owner, but the treaty with France precluded this result.³² The pact dictated that French property discovered aboard a French enemy's

25. THE FEDERALIST NO. 3, at 43 (J. Jay) (Mentor ed. 1961).

26. 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). Cf. Comment, *Torture As a Violation of the Law of Nations: Interpreting the Alien Tort Statute*, 7 BROOKLYN J. INT'L L. 413, 422 n.60 (1981) (interprets *Bolchos* court as not sustaining ATCA jurisdiction merely because it was alternatively cited by court).

27. See Comment, *supra* note 16, at 117.

28. *Bolchos v. Darrel*, 3 F. Cas. at 810.

29. *Id.*

30. *Id.*

31. *Id.* at 810-11.

32. *Id.* at 811.

vessel was subject to forfeiture.³³ Because the law of nations had been altered by agreement and because international tensions with Spain and England³⁴ discouraged a contrary result, the court held for plaintiff.³⁵

The *Bolchos* opinion is brief and does not address the necessity of proving a separate and distinct grant of a cause of action when the law of nations is violated. This is not surprising because in *Bolchos* it was a treaty, not a law of nations infraction, that prompted use of ATCA as an alternative basis for jurisdiction.³⁶

B. Decline

After *Bolchos*, ATCA was not successfully invoked for 166 years.³⁷ What accounts for this hiatus? The statute's disuse is attributed to a complex of factors, including murky legislative intent³⁸ and separation of powers concerns.³⁹ Centrally important, however, was the changing nature of international law during the nineteenth century.⁴⁰ The 1800s marked a divergence in international law: what was once a single jurisprudential body now split into "public" and "private" spheres.⁴¹ Public international law dealt with the rights and duties of interacting sovereigns. Private international law, in contrast, regulated the principles of comity that nations used to give effect to municipal laws⁴² governing individuals.⁴³ This divergence was due largely to the influence of positivism, a political theory regarding the activities of states, not individuals, as the core of international law.⁴⁴ If a principle were not embodied in an express or implied agreement between sovereigns, positivism dictated that it had no validity in international governance.⁴⁵ Thus, statutes permitting persons to seek redress against foreign sovereigns ran counter to

33. *Id.*

34. See Comment, *supra* note 16, at 117.

35. *Bolchos v. Darrel*, 3 F. Cas. at 811.

36. *Id.* at 810.

37. The next case to utilize ATCA successfully was *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961). See *infra* text accompanying note 50.

38. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (Bork, J., concurring) (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3617 (U.S. Feb. 26, 1985) (No. 83-2052).

39. *Id.* at 799.

40. See Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 56 (1981).

41. See M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 71 (5th ed. 1984); see generally 16 Am. Jur. 2d *Conflict of Laws* §§ 1 & 2 (2d ed. 1979) (discussion of private and public aspects of international law).

42. Municipal laws pertain "solely to the citizens and inhabitants of a state, and [are] thus distinguished from . . . international law." BLACK'S LAW DICTIONARY 918 (5th ed. 1979).

43. See 16 Am. Jur. 2d *Conflict of Laws* §§ 1 & 2 (2d ed. 1979).

44. See AKEHURST, *supra* note 41, at 14 & 71.

45. G. VON GLAHN, LAW AMONG NATIONS 46 (1970).

positivism's deemphasis of individual rights in international law. ATCA was no exception. Accordingly, positivism discouraged the statute's use during the nineteenth century.

C. *Resurgence*

World War One heralded the beginning of a gradual ideological shift back to the belief that individual rights were an integral part of international law.⁴⁶ Following the human rights atrocities of the Second World War,⁴⁷ this trend continued as nations sought to guarantee enumerated individual rights via multilateral agreements such as the United Nations Charter⁴⁸ and the Universal Declaration of Human Rights.⁴⁹ Federal district courts were not isolated from these developments, and ATCA was again recognized as a possible jurisdictional avenue to redress internationally proscribed violations of individual rights.

1. *Adra v. Clift*.—ATCA once again provided a jurisdictional basis for an alien tort suit in *Abdul-Rahman Omar Adra v. Clift*.⁵⁰ Plaintiff brought an action in district court to obtain custody of his fifteen-year-old daughter Najwa, who lived with Adra's divorced wife and her American husband.⁵¹

Plaintiff, his ex-wife, and Najwa were Sunnite Moslems. Under Lebanese and Mohammedan law, Adra was entitled to custody of his daughter when she reached age nine. Plaintiff contended that his former spouse had concealed Najwa's identity and nationality and had illegally spirited her from country to country using an Iraqi passport.⁵²

After examining Lebanese and United States law and inquiring into the law of nations, the district court held that defendants' activity constituted a "tort" within the scope of ATCA.⁵³ The court re-

46. *Id.*

47. J. GREENE, THE UNITED NATIONS AND HUMAN RIGHTS 653-55 (1956); Note, *The Application of International Human Rights in United States Courts: Customary International Law Incorporated Into American Domestic Law*, 8 BROOKLYN J. INT'L L. 207 (1982); see Hoffman, *Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal*, 112 DAEDALUS 19 (1983); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 9-17 (1982); Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317, 318 (1981); Note, *Federal Jurisdiction and the Protection of International Human Rights*, 9 N.Y.U. REV. L. & SOC. CHANGE 199, 217 (1979).

48. U.N. CHARTER, signed June 26, 1945, entered into force Oct. 24, 1945, 59 Stat. 1031, T.S. No. 778.

49. 3 U.N. GAOR, c.3 Annexes 535, 536-41, U.N. Doc. A/777 (1948).

50. 195 F. Supp. 857 (D. Md. 1961).

51. *Id.* at 859.

52. *Id.*

53. *Id.* at 863-65.

jected the contention that the statute should not apply because the case involved domestic relations. The district judge weighed this assertion with the possible foreign relations impact of denying jurisdiction. Plaintiff was a Lebanese ambassador. If the court held ATCA inapplicable, the United States' relations with Lebanon, a friendly sovereign,⁵⁴ could be strained. The court looked to the perceived purpose of the statute, reasoning that "[a]n alien . . . may prefer to bring an action for a tort in a federal court rather than in a local court, and Congress has authorized him to do so in this limited class of cases."⁵⁵ The balance accordingly favored Adra. But despite invocation of ATCA and the determination that defendant had violated the law of nations, the court declared that the interests of the child were best served by permitting her to remain with her mother.⁵⁶

Two observations about *Adra* are significant here. First, by enabling plaintiff to use ATCA as a jurisdictional basis for his claim, the *Adra* court became the first federal tribunal to take cognizance of a "tort only, committed in violation of the law of nations."⁵⁷ Second, the court "made no effort to tease out of international law an explicit duty, placed on individuals, that had been violated."⁵⁸ Pleading and proving a separate and distinct cause of action simply was not necessary to invoke ATCA. Instead, the court discerned a law of nations violation and ruled this was sufficient to trigger the statute and provide Adra with a federal forum.

2. *Filartiga v. Pena-Irala*.—Nineteen years after the *Adra* court applied ATCA, the United States Court of Appeals for the Second Circuit permitted an alien to invoke the statute in a situation that wrought a profound effect on domestic attempts to protect international human rights. In *Filartiga v. Pena-Irala*,⁵⁹ the Second Circuit held that torture was a universally abhorred transgression of the law of nations.⁶⁰ Accordingly, if an alien served process on an alleged torturer within the United States, ATCA would enable a federal district court to hear the claim. The nationality of the parties was irrelevant.⁶¹ As long as the offender's acts could be attributed to a state,⁶² international law was violated and district courts could hear the case.

54. See Comment, *supra* note 16, at 123.

55. Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. at 865.

56. *Id.* at 866-67.

57. 28 U.S.C. § 1350 (1982).

58. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 787 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 53 U.S.L.W. 3617 (U.S. Feb. 26, 1985) (No. 83-2052).

59. 630 F.2d 876 (2d Cir. 1980).

60. *Id.* at 884.

61. *Id.* at 878.

62. *Id.* at 884.

Until the Second Circuit rendered the *Filartiga* decision, the prospect of invoking ATCA to redress human rights violations was not promising.⁶³ Only the *Bolchos* and *Adra* plaintiffs had successfully used the statute as a route to federal court. Human rights litigation was not readily analogized to either precedent: the *Bolchos* court looked to a Franco-American treaty,⁶⁴ and *Adra* was a child custody case.⁶⁵

Filartiga was a maverick. Although the opinion declared that torture was forbidden by the law of nations, its mode of analysis provides a precedential framework enabling courts to discern other internationally proscribed human rights abuses.

The *Filartiga* plaintiffs were Paraguayan nationals, the father and sister of a youth allegedly tortured to death in a Paraguayan prison. Defendant Pena-Irala, a government official, allegedly killed the boy to avenge his father's political opposition to Alfredo Stroessner, President of Paraguay. All parties were in the United States on visitors' visas⁶⁶ when plaintiffs served process on Pena-Irala for the youth's wrongful death.

Plaintiffs used ATCA and 28 U.S.C. § 1331⁶⁷ as their principal claims for district court jurisdiction.⁶⁸ On May 15, 1979, the district court held that subject matter jurisdiction did not exist. The court acknowledged the strength of plaintiffs' arguments that torture was

63. In the following cases ATCA jurisdiction was held not to exist, creating the impression that attempts to invoke the statute in a human rights context might well fail: *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (law of nations does not prohibit air crashes); *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (child custody dispute over children airlifted from South Vietnam to United States does not involve law of nations); *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) (no law of nations violation exists when parties are nationals of same sovereign); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (Eighth Commandment does not describe law of nations violation); *Abiodun v. Martin Oil Service*, 475 F.2d 142 (7th Cir.), *cert. denied*, 414 U.S. 866 (1973) (fraud is not a law of nations violation); *Khedivial Line, S.A.E. v. Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960) (picketing does not violate law of nations); *Damaskinos v. Societa Navigacion Interamericana, S.A., Panama*, 255 F. Supp. 919 (S.D.N.Y. 1966) (unseaworthy vessel does not constitute a law of nations violation); *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324 (E.D. Pa. 1966) (refusal to pay insurance proceeds to alien does not violate law of nations); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292 (E.D. Pa. 1963) (unseaworthiness and negligence not a law of nations violation); *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958) (individuals do not have treaty right to contest nuclear detonations); *Moxon v. The Brigantine Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (marine libel action not a "tort only" under ATCA); *but cf. Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (1975) (although seizure and airlift of Vietnamese to United States may violate law of nations, court reluctant to decide whether ATCA applies without adequate briefing).

64. See *supra* text accompanying note 36.

65. See *supra* text accompanying notes 50-58.

66. *Filartiga v. Pena-Irala*, 630 F.2d at 878.

67. This "federal question" statute provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1982).

68. Jurisdiction was also found to exist under 28 U.S.C. § 1651 (writs); 28 U.S.C. § 2201 (creation of remedy); 28 U.S.C. § 2202 (further relief).

emerging as a law of nations infraction, but believed two earlier Second Circuit opinions precluded a finding that ATCA applied to the *Filartiga* facts. Dicta in *Dreyfus v. Von Finck*⁶⁹ and *IIT v. Vencap, Ltd.*⁷⁰ stated that ATCA required a narrow construction of the law of nations to exclude cases dealing with a state's treatment of its own nationals.⁷¹ The district court obeyed this dicta by dismissing the action.⁷²

The Second Circuit reversed on appeal. The court held that ATCA applied because "torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."⁷³ To reach this conclusion Judge Kaufman determined that ATCA was not to be construed to encompass the law of nations as it existed in 1789. Kaufman followed the dictates of *The Paquete Habana*,⁷⁴ in which the Supreme Court held that international law was not static, but growing.⁷⁵

To determine if torture was one of the emerging prohibitions of the law of nations, the Second Circuit looked to sources enumerated in *United States v. Smith*,⁷⁶ including the writings of commentators, customs among nations, and judicial decisions applying international law.⁷⁷ The United Nations Charter,⁷⁸ the Universal Declaration of Human Rights,⁷⁹ and the Declaration on the Protection of All Persons from Being Subjected to Torture⁸⁰ were also instructive. These documents created a transnational "expectation of adherence,"⁸¹ buttressed by state custom, that enabled the court to declare the pro-

69. 534 F.2d 24 (2d Cir.), cert. denied, 429 U.S. 835 (1976). See *supra* note 63.

70. 519 F.2d 1001 (2d Cir. 1975). See *supra* note 63.

71. See *Dreyfus v. Von Finck*, 534 F.2d at 30-31 ("There is a general consensus . . . that [the law of nations] deals primarily with the relationship among nations rather than among individuals"); *IIT v. Vencap, Ltd.*:

The reference to the law of nations must be narrowly read . . . [A] violation . . . arises only when there has been 'a violation by one or more individuals of those standards, rules, or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.'

519 F.2d at 1015 (quoting *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)).

72. *Filartiga v. Pena-Irala*, 630 F.2d at 880.

73. *Id.*

74. 175 U.S. 677 (1900).

75. *Id.* at 700.

76. 18 U.S. (5 Wheat.) 153, 160-61 (1820).

77. *Id.*

78. U.N. CHARTER, signed June 26, 1945, entered into force Oct. 24, 1945, 59 Stat. 1031, T.S. No. 778.

79. G.A. Res. 217A, arts. 3, 5, U.N. Doc. A/810 at 72-73 (1948). Article 3 states: "Everyone has the right to life, liberty and the security of person." *Id.* Article 5 declares: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

80. 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975).

81. *Filartiga v. Pena-Irala*, 630 F.2d at 883.

hibition of torture an emergent principle of international law.

After declaring torture illegal, the *Filartiga* court refused to apply the prohibition discriminately. The offense "admit[ted] of no distinction between treatment of aliens and citizens."⁸² The Second Circuit therefore overruled the portion of *Dreyfus v. Von Finck*⁸³ that perceived no international law violation when the injured parties were nationals of the offending state.

The court next examined Pena-Irala's contention that article III of the United States Constitution forbade plaintiffs' use of ATCA. Because article I, section 8, clause 10 enabled Congress to "define and punish . . . offenses against the law of nations," Pena-Irala argued that the law of nations became part of federal common law only if Congress "defined" the offense.⁸⁴ The Second Circuit disagreed. Judge Kaufman followed the Supreme Court's directive in *The Nereide*⁸⁵ by enforcing "the law of nations, which is part of the law of the land"⁸⁶ even in the absence of a federal statute.

After remanding the case,⁸⁷ the *Filartiga* court examined Pena-Irala's contention that the "customary law of nations"⁸⁸ was inapplicable if the treaties evidencing it did not create private causes of action. Judge Kaufman declared this was a choice of law issue to be addressed in later proceedings.⁸⁹

Filartiga's impact was threefold. First, the decision is a victory for human rights activists because it facilitates aliens' attempts to redress governmental torture in United States courts. Second, *Filartiga* signals that the law of nations is not static. The time-honored canon of activities⁹⁰ forbidden by this genre of international law must expand to accommodate the demands of an increasingly sophisticated world community. The Second Circuit responded by implicitly erecting a framework that enables domestic courts to discern the

82. *Id.* at 884.

83. 534 F.2d at 31. *See supra* notes 63 & 69 and accompanying text.

84. *Filartiga v. Pena-Irala*, 630 F.2d at 885.

85. 13 U.S. (9 Cranch) 388 (1815).

86. *Id.* at 422.

87. *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). On remand, the district court held:

The record in this case shows that torture and death are bound to recur unless deterred. This court concludes that an award of punitive damages of no less than \$5,000,000 to each plaintiff is appropriate to reflect adherence to the world community's proscription of torture and to attempt to deter its practice.

Id. at 867.

88. *Filartiga v. Pena-Irala*, 630 F.2d at 889.

89. *Id.* Choice of law issues are not discussed in this Comment because, though closely related, they are analytically distinct from the issue of whether a cause of action should be inferred pursuant to ATCA. *See id.* Cf. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 788 (Edwards, J., concurring) (different choice of law formulations nevertheless share an important characteristic: none requires that "plaintiffs identify and plead a right to sue granted by the law of nations").

90. *See infra* text accompanying note 210.

changing scope of the law of nations. The *Filartiga* opinion implied that torture was not the exclusive human rights abuse currently available for international prohibition.⁹¹ By labeling the torturer "*hostis humani generis*, an enemy of all mankind,"⁹² Judge Kaufman hinted that analogous activities of other state actors might earn them similar titles. The *Filartiga* court favored using international treaties and declarations as judicial barometers. If multilateral agreements proscribed certain behavior and reflected international consensus, they were evidence of the law of nations. Last, the Second Circuit did not require plaintiffs to plead and prove a cause of action separate and distinct from ATCA. Plaintiffs obtained a federal forum merely by showing that torture occurred and was forbidden as a *hostis humani generis* offense.

III. *Tel-Oren v. Libyan Arab Republic*: The Cause of Action Dilemma

Regardless of whether *Filartiga* was properly decided, it is clear the Second Circuit's opinion clarified the federal courts' role in resolving international human rights disputes.⁹³ The same cannot be said for the District of Columbia Court of Appeals' decision in *Tel-Oren v. Libyan Arab Republic*,⁹⁴ an analogous case decided four years later.

In *Tel-Oren*, alien plaintiffs brought suit in Federal District Court for the District of Columbia, alleging an international tort. They claimed jurisdiction existed pursuant to ATCA. Departing from the precedent set in *Filartiga*, the district court dismissed the action largely because plaintiffs failed to allege a right to relief apart from ATCA.⁹⁵

Although the District of Columbia Court of Appeals rendered a brief per curiam affirmance,⁹⁶ the three-judge panel proceeded to generate fifty-two additional pages explaining their widely divergent reasons for upholding the district court's decision. A central issue was whether ATCA required allegations of a distinct law of nations cause of action before it could authorize jurisdiction. Two of the three circuit judges addressed this question and squarely disagreed. Judge Edwards believed that an alien plaintiff was required to prove

91. *Filartiga v. Pena-Irala*, 630 F.2d at 885. The court declared that "the ultimate scope of those rights will be a subject for continuing refinement and elaboration." *Id.*

92. *Id.* at 890.

93. ATCA is not, however, used exclusively in human rights litigation. See *supra* note 63.

94. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3617 (U.S. Feb. 26, 1985) (No. 83-2052).

95. Other reasons for dismissal were also advanced by the district court. See *infra* text accompanying notes 105-07.

96. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 775.

only a law of nations violation to trigger ATCA, which in turn provided the requisite cause of action.⁹⁷ In contrast, Judge Bork believed ATCA did not contain a cause of action because it was merely a jurisdictional statute. He argued that an alien had to show a distinct right to relief granted by the law of nations itself. Only then could ATCA provide jurisdiction.⁹⁸

Although they form only part of a plurality decision, the Bork and Edwards concurrences reflect conflicting views of ATCA's role in international human rights litigation. An examination of these opinions is therefore necessary to determine which judge best defined ATCA's proper function.

A. Background

On March 11, 1978, the Palestine Liberation Organization (PLO) commenced a terrorist mission in Israel. Thirteen members of El Fatah,⁹⁹ a PLO faction, disembarked a boat and landed on a beach near Haifa. The heavily armed terrorists began their quest by fatally shooting an American photographer in the vicinity. Proceeding to a highway connecting Haifa and Tel Aviv, the Palestinians fired at a passing bus, forcing it to stop. The terrorists commandeered the vehicle, killed some passengers, and took the survivors hostage. As they fired at passing cars, the Arabs seized a taxi, a Mercedes, and a second civilian bus. All hostages were then ordered to board the first bus. The terrorists instructed the driver to go to Tel Aviv.¹⁰⁰

Civilian police heard of the attacks and erected a roadblock. After the bus crashed through barricades, the police shot its tires, stopping the vehicle. The terrorists proceeded to fire upon the hostages and surrounding police. Hand grenades were detonated inside the bus and tossed from the vehicle's windows. Although most hostages eventually escaped, thirty-four people were killed and eighty-four seriously wounded.¹⁰¹

Survivors of the attack and personal representatives of those who died brought an action in Federal District Court for the District

97. *Id.* at 779 (Edwards, J., concurring). The terms "violation" and "cause of action" are not synonymous. When the law of nations is "violated," a state actor has engaged in certain proscribed behavior. But this violation does not give plaintiff a "cause of action," which is a right to relief entirely distinct from the infraction itself. *See supra* note 6.

98. *Id.* at 798-99 (Bork, J., concurring).

99. Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 237 n.8 (1982). This note investigates and analyzes *Tel-Oren* at the district court level.

100. *Id.*; Appellants' Petition for a Writ of Certiorari at 2-4, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3617 (U.S. Feb. 26, 1985) (No. 83-2052) [hereinafter cited as *Petition*].

101. *Petition*, *supra* note 100, at 3 & 4.

of Columbia.¹⁰² Defendants were the Libyan Arab Republic, the PLO, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. Plaintiffs alleged various torts, requested compensatory and punitive damages, and claimed jurisdiction existed under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1332 (diversity); 28 U.S.C. § 1350 (ATCA); and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1602 through 1611.¹⁰³

The district court granted defendants' motions for dismissal and summary judgment and never reached the merits.¹⁰⁴ Three reasons were advanced for the court's action. First, Judge Green noted the absence of an express or clearly implied cause of action in the treaties cited by plaintiffs. Accordingly, federal question jurisdiction did not exist.¹⁰⁵ Second, the court held that the relevant one-year statute of limitations had expired.¹⁰⁶ Third, the court found that ATCA did not apply because plaintiffs failed to show a separate and distinct cause of action embodied in either a treaty or the law of nations.¹⁰⁷ Judge Green reasoned that ATCA was "merely . . . an entrance into the federal courts and in no way provide[d] a cause of action to any plaintiff."¹⁰⁸ This view radically departed from the *Filartiga* precedent. The Second Circuit merely required that plaintiffs allege a law of nations violation, not an express law of nations cause of action, to invoke ATCA.¹⁰⁹

B. District of Columbia Court of Appeals Opinion

The disparity between *Filartiga* and *Tel-Oren* thrust the cause of action issue to the forefront when plaintiffs appealed to the District of Columbia Circuit Court.¹¹⁰ Initially it appeared an affirmance would create a precedent squarely at odds with the *Filartiga* holding. This did not occur. Although the District of Columbia

102. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), *aff'd* 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3617 (U.S. Feb. 26, 1985) (No. 83-2052).

103. At district court level, Libya and the PLO were not served with process. The court nevertheless "ordered the parties to file motions as to the jurisdictional question on an expedited basis." *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. at 545 n.1.

104. *Id.* at 549.

105. *Id.* at 546-48.

106. *Id.* at 550-51.

107. *Id.* at 549.

108. *Id.*

109. See *Filartiga v. Pena-Irala*, 630 F.2d at 878. The Second Circuit held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [ATCA] provides federal jurisdiction." *Id.* See also *supra* note 97 (explanation of distinction between law of nations "violation" and "cause of action").

110. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 775 n.1 (Edwards, J., concurring).

Court of Appeals rendered a per curiam opinion, it consisted of four brief paragraphs affirming District Judge Green's holding. All judges agreed the district court opinion should stand, but they were unable to reach a consensus. Of the three concurrences rendered, only Judges Edwards and Bork dealt explicitly with the cause of action dilemma.¹¹¹ Their views on this issue were diametrically opposed. Judge Edwards believed ATCA contained a cause of action. Judge Bork disagreed.

1. *Edwards: A Right to Relief is Inherent in ATCA.*—Judge Edwards held that ATCA embodies a cause of action. Under this theory, an alien could successfully invoke the statute if he were to allege a law of nations violation. This view is consistent with the *Filartiga* decision, but entirely at odds with Bork's conception of ATCA.

Edwards began his analysis by arguing that only federal law could create a cause of action. Thus, in the context of ATCA, alleging a law of nations violation merely triggered the statute, which in turn provided alien plaintiffs with a right to relief and a forum. Requiring proof of a private cause of action under the law of nations would create an additional condition that never before existed.¹¹² Edwards suggested that Bork created this new mandate to forestall judicial attempts to assume an executive or legislative role.¹¹³ This was, in Edwards' view, an unjustified attempt "to write into [ATCA] an additional restriction that is not even suggested by the statutory language."¹¹⁴ Edwards further criticized Bork's interpretation of the statute because it required the world community to reach a consensus on the right to sue—an unlikely event "given the existing array of legal systems within the world."¹¹⁵

111. Circuit Judge Robb believed a nonjusticiable political question was before the court. He therefore concurred in the decision. Robb believed, however, that

[c]ourts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations Plaintiffs would troop to court marshalling their 'experts' behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international 'law.'

Id. at 827 (Robb, J., concurring).

112. *Id.* at 779 (Edwards, J. concurring).

113. *Id.* at 779-80.

114. *Id.* Edwards went on to state that "Judge Bork virtually concedes . . . he is interposing a requirement that the law of nations provide a right to sue simply to void a statute of which he does not approve" *Id.* at 790.

115. *Id.* at 778. To buttress his assertion that ATCA contains a private cause of action, Edwards noted that in 1907 the United States Attorney General believed the statute provided an inherent right to relief. *Id.* at 780. American citizens had diverted the Rio Grande, harming the interests of Mexican nationals. After examining whether the Mexicans could use ATCA to redress the injury, the Attorney General issued an opinion concluding that the statute "provide[d] a forum and a right of action." 26 Op. Att'y Gen. 250, 253 (1907).

Although Edwards criticized Bork's attempts to require a showing of a separate and distinct cause of action, he was careful to place restrictions on aliens' use of ATCA. Only certain state-sponsored criminal activities, heinous in nature, were to obtain the status of a law of nations violation. When a governmental undertaking violated "definable, universal and obligatory norms,"¹¹⁶ ATCA triggered, giving plaintiffs a private cause of action under federal law.¹¹⁷

Thus, Edwards clearly agreed with the Second Circuit's reasoning in *Filartiga*. But the judge determined that another obstacle prevented plaintiffs' use of ATCA. Because the terrorists were not state actors, Edwards refused to rule that a law of nations violation occurred.¹¹⁸ He therefore affirmed the district court's holding.¹¹⁹

2. *Bork: A Right to Relief is not Inherent in ATCA.*—Judge Bork believed ATCA did not contain a cause of action. He accordingly argued that the relevant inquiry was whether a right to relief should be inferred from the law of nations.¹²⁰ This view was contrary to both *Filartiga* and Edwards' concurrence. Indeed, no other tribunal had ever attempted to discern an implied cause of action apart from ATCA itself.¹²¹

Bork's arguments shared an underlying policy concern: the fear that inferring a cause of action would constitute impermissible judicial activism.¹²² If the law of nations implicitly contained a cause of action allowing alien plaintiffs to redress governmental torture, ATCA would open federal courts to a myriad of suits not formerly actionable under international law.¹²³ Bork therefore believed there existed " 'special factors counselling hesitation in the absence of affirmative action by Congress.' "¹²⁴

Interestingly, Bork did not invoke the Act of State¹²⁵ or Politi-

116. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 781 (Edwards, J., concurring).

117. *Id.*

118. *Id.* at 795. Edwards did not proclaim terrorism a law of nations violation. Rather, he examined whether the terrorists' alleged acts of torture violated international human rights law. He concluded they did not. *Id.* Some commentators have criticized this portion of Edwards' opinion because it does not address whether the allegedly Libyan-financed PLO was a state actor. See Leigh, *Judicial Decisions*, 78 AM. J. INT'L L. 668, 670 (1984). An analysis of whether non-state actors are subject to ATCA is beyond the scope of this Comment. For more information on the non-state actor issue, see *id.* See also Petition, *supra* note 100, at 17 ("The PLO in this case stands in the same relation to Libya as the defendant in *Filartiga* did to Paraguay.").

119. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 798 (Edwards, J., concurring).

120. *Id.* at 801 (Bork, J., concurring).

121. See Leigh, *Judicial Decisions*, 78 AM. J. INT'L L. 668, 670 n.6 (1984) (citing *Dreyfus v. Von Finck*, 534 F.2d 24, 28 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976)).

122. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 804 (Bork, J., concurring).

123. *Id.* at 812.

124. *Id.* at 801 (quoting *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

125. See *infra* text accompanying note 167.

cal Question¹²⁶ doctrines. Instead, he borrowed their "separation of powers" rationale and applied it to the facts before him. Bork probably took this approach because the doctrines are not normally applied during a cause of action analysis.¹²⁷ Bork essentially feared that, if a right of action for torture were inferred from the law of nations, plaintiffs' suit would substantially interfere with Middle East diplomacy. He therefore refused to make this inference.¹²⁸

Bork also rejected the contention that a law of nations cause of action exists domestically because it is included in federal common law:

To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that [international law], like the common law of contract and tort . . . itself affords individuals the right to ask for judicial relief.¹²⁹

Another argument Bork advanced addressed his concern that plaintiffs' interpretation of the statute would render all treaties self-executing.¹³⁰ He believed that if a private cause of action were held to exist for law of nations violations, it would exist for treaty violations as well. This ATCA construction would contravene the intentions of those who drafted international agreements of a diplomatically sensitive nature.¹³¹

Thus, Bork examined whether it was proper to adjudicate a dispute involving alien defendants whose activities were politically motivated.¹³² Because he believed these concerns were best left to other governmental branches, Bork concluded he would not infer a right to relief from the alleged law of nations violation in issue.¹³³ He therefore concurred in the affirmance.

The Edwards and Bork opinions contain conflicting views on the federal courts' role in deciding international disputes. Edwards believed district courts were appropriate fora for aliens to redress law of nations infractions, while Bork sought to stem what he perceived to be judicial activism. Whether ATCA embodies a cause of action was crucial in determining which view prevailed. It is therefore helpful to further examine the major aspects of the Edwards and Bork

126. See *infra* text accompanying note 171.

127. See *infra* text accompanying notes 168 & 173.

128. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 804-05 (Bork, J., concurring).

129. *Id.* at 811.

130. *Id.* at 812. A treaty is self-executing "when it expressly or impliedly provides a private right of action." *Id.* at 808.

131. *Id.* at 812.

132. See *id.* at 822.

133. *Id.*

concurrences to discover which opinion best defines ATCA's proper role.

IV. Should a Cause of Action Be Inferred Pursuant to ATCA?

Despite their disparity, the Edwards and Bork concurrences effectively require courts to infer a cause of action before ATCA can grant jurisdiction. Edwards believes ATCA does not require a separate and distinct law of nations violation, and that the statute itself provides a right to relief.¹³⁴ Thus, if an infraction is alleged, jurisdiction exists.¹³⁵ But ATCA's language does not expressly state that an alien is entitled to a remedy. Given this ambiguity,¹³⁶ a right to relief must be inferred.¹³⁷ Bork, in contrast, believes a cause of action, if it is to exist at all, must be inferred from the law of nations.¹³⁸ In his view, ATCA is merely a jurisdictional grant that cannot itself provide a right to relief.¹³⁹

Under either argument, if a cause of action is to be found, it must be inferred. It is therefore possible to interpret ATCA as authorizing an inference consistent with Edwards' and Bork's cause of action theories. The statute can be viewed as impliedly *embodying* a right to relief, or can be construed to contain implied *authority to discern* a right to relief under the law of nations.¹⁴⁰

An examination of statutory construction principles and Bork's "separation of powers" concerns demonstrates that this interpretive approach is desirable. The proposed construction effectively resolves Edwards' and Bork's debate about *where* a cause of action is located and permits a court to inquire *whether* inferring a right to relief under ATCA is appropriate and consistent with legislative intent. This "dual construction" analysis indicates a cause of action should be inferred pursuant to ATCA.

A. Applying Basic Statutory Construction Principles to ATCA

Much of the *Tel-Oren* opinion is, in reality, an exercise in statutory interpretation. The numerous policy issues, including Judge

134. *Id.* at 777-79 (Edwards, J., concurring).

135. *Id.* at 779.

136. See *infra* notes 142-53 and accompanying text.

137. *Id.*

138. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 799 (Bork, J., concurring).

139. *Id.* at 811.

140. Cf. *Dreyfus v. Von Finck*, 534 F.2d 24, 28 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). The *Dreyfus* holding is consistent with Bork's view that ATCA does not contain a cause of action. But, unlike the Bork concurrence, *Dreyfus* dictates that ATCA gives "the [d]istrict [c]ourt power to determine whether, in a well-pleaded complaint, a cause of action exists." *Id.* (emphasis added). Bork, by comparison, believes a cause of action must be inferred independently of ATCA, if it is to be inferred at all. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 811 (Bork, J., concurring).

Bork's separation of powers concerns,¹⁴¹ are in effect attempts to "interpret" ATCA. Some basic principles of construction nevertheless can be examined to cast light on the question whether a cause of action should be inferred pursuant to ATCA's dictates.

1. *Plain Meaning?*—Analysis discussing ATCA often focuses on whether the statutory language is clear.¹⁴² The authorities are split.¹⁴³ In *Tel-Oren*, Judge Edwards suggested ATCA contained a cause of action because "[t]he language of the statute is explicit"¹⁴⁴ Plaintiffs, in their petition for certiorari filed with the United States Supreme Court,¹⁴⁵ suggested that ATCA's plain meaning should control its application because the language is "[e]xpress and [u]nambiguous."¹⁴⁶ In contrast, one commentator lamented that "the vague language of [ATCA] makes definition of a cause of action difficult,"¹⁴⁷ and another explained that courts are often prompted to refuse ATCA jurisdiction because "the language of the statute is vague."¹⁴⁸

If those who contend ATCA is unambiguous are correct, the "plain meaning" doctrine would apply. This principle was articulated in *Caminetti v. United States* as follows:¹⁴⁹ "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise"¹⁵⁰ But despite contentions that the statute's meaning is clear,¹⁵¹ it must be recalled that ATCA does not expressly state that a cause of action exists.¹⁵² The best indications of ATCA's ambiguity, however, are the "long and complex"¹⁵³ concurrences rendered by the *Tel-Oren* court, which involved considerable discussion of the cause of action issue. This extensive plurality opinion supports the theory that, contrary to Edwards' views, the

141. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 798-806 (Bork, J., concurring).

142. ATCA states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1976).

143. See *infra* text accompanying notes 144, 146-48. See also Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 256 (1982) (ATCA has "plain language"); Comment, *The Alien Tort Statute: United States Jurisdiction Over Acts of Torture Committed Abroad*, 23 WM. & MARY L. REV. 103, 119 (1981) (ATCA "is cast in broad, undefined terms").

144. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 779 (Edwards, J., concurring).

145. Petition, *supra* note 100.

146. *Id.* at v.

147. Note, *The Domestic Application of International Human Rights Law*, 5 HASTINGS INT'L & COMP. L. REV. 161, 188 (1981).

148. Comment, *supra* note 16, at 107.

149. 242 U.S. 470 (1917).

150. *Id.* at 485.

151. See *supra* text accompanying notes 144 & 146.

152. For a brief explanation of the problems imposed by ambiguous statutes, see N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.02 (4th ed. 1984).

153. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 820 (Bork, J., concurring).

statute's meaning is unclear. Accordingly, a right to relief must be inferred under ATCA.

2. *Absence of "Arising Under" Language.*—Analysis of a similar jurisdictional statute provides justification for inferring a cause of action under ATCA. 28 U.S.C. § 1331(a), which grants federal question jurisdiction, dictates that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States." ATCA, by comparison, declares that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁵⁴ Although each statute is a jurisdictional grant, section 1331 contains the phrase "arising under," which is not found in ATCA. This phrase has been construed to require plaintiffs to plead and prove a separate cause of action apart from section 1331.¹⁵⁵ It is therefore arguable that, because ATCA does not contain "arising under" language, Congress did not intend to require alien plaintiffs to identify a distinct right to relief apart from ATCA.¹⁵⁶

This argument is especially viable because the "arising under" phrase has developed significance through numerous interpretations of the often-used federal question statute.¹⁵⁷ As early as 1911, the United States Supreme Court articulated the importance of "arising under" language in determining federal jurisdiction.¹⁵⁸ Thus, when Congress amended ATCA in 1948,¹⁵⁹ it was clearly aware that the term "arising under" signaled courts to look to another statute to find a cause of action.¹⁶⁰ Although Congress could have made ATCA more consistent with section 1331 by adding "arising under" language at this time, it refrained from doing so.¹⁶¹ The absence of this change suggests that Congress believed ATCA embodied an implied cause of action.

Although this analysis of probable congressional intent is helpful, it is best to search elsewhere for further indications that ATCA

154. 28 U.S.C. § 1350 (1976).

155. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (right to relief arises under patent law, not jurisdictional grant). See generally 28 U.S.C. §§ 161-260 notes (1976) (notations about actions "arising under" federal laws and treaties).

156. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 779 (Edwards, J., concurring); Petition, *supra* note 100, at 15.

157. See, e.g., 28 U.S.C. §§ 161-260 notes (1976).

158. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 779 n.3 (Edwards, J., concurring) (discussion of "arising under" language).

159. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 779 n.3 (Edwards, J., concurring).

160. *Id.*

161. *Id.*

should be construed to authorize a right to relief. It is especially instructive to inquire whether separation of powers concerns voiced by Judge Bork preclude the inference that a right to relief exists pursuant to ATCA.

B. Validity of Separation of Powers Concerns

When a statute must be judicially construed, policy considerations play an important role in defining its function.¹⁶² ATCA is no exception. Whether a cause of action should be inferred from this jurisdictional grant depends upon the policies a court wishes to sustain or promote. Judge Bork's separation of powers concerns, which stand in direct opposition to inferring an ATCA cause of action, are undesirable judicial policy for two reasons. First, Bork's fear of judicial activism is outweighed by the need to prevent human rights atrocities proscribed by the world community. Second, constraints exist that can limit federal adjudication of torts violating the law of nations. Accordingly, district courts are unlikely to be subject to a barrage of politically sensitive alien tort claims. Before addressing Bork's arguments in more detail, however, it is appropriate to examine the doctrines from which his separation of powers concerns are derived to determine whether courts are obligated to adopt a similar cautionary approach.

1. *Must Separation of Powers Concerns Prevent the Inference of an ATCA Cause of Action?*—Judge Bork's separation of powers concerns are derived from the Act of State¹⁶³ and Political Question¹⁶⁴ doctrines. He contended these theories, which discourage judicial interference in foreign affairs relegated to other branches of government,¹⁶⁵ can be analogously applied to the issue whether a cause of action can be inferred under ATCA. After applying these derivative principles, Bork refused to make the inference.¹⁶⁶ This section examines whether courts are obligated to act in accordance with Bork's viewpoint. Analysis of Bork's rationale will lead to the conclusion that they are not.

The Act of State Doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized sovereign power committed within its own territory."¹⁶⁷ The doctrine is

162. See *supra* text accompanying note 141.

163. See *infra* text accompanying note 167.

164. See *infra* text accompanying note 171.

165. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 804 (Bork, J., concurring) (citing *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 785-93 (1972) (Brennan, J., dissenting)).

166. *Id.* at 799.

167. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

not normally part of the jurisdictional analysis; rather, it precludes the judiciary from reaching the merits of the case once jurisdiction is found to exist.¹⁶⁸ This explains Bork's analytical approach: he refused to invoke the Act of State Doctrine, but nevertheless attempted to apply "separation of powers principles"¹⁶⁹ derived from it. In this manner he hoped to avoid criticism that he was applying the doctrine in an unorthodox fashion. Bork essentially gave the theory a new name and attempted to apply it in a novel manner. Given "the considerable disagreement among the [United States Supreme Court] Justices regarding the rationale, scope and flexibility of the [Act of State D]octrine,"¹⁷⁰ Bork's approach is not obligatory when a cause of action issue is adjudicated.

Judge Bork attempted to apply the rationale of the Political Question Doctrine in a similar manner. A political question is non-justiciable when it is one "which courts will refuse to decide [because its] determination would involve an encroachment upon the executive or legislative powers."¹⁷¹ Bork refused to apply the doctrine expressly because "the contours . . . are murky and unsettled."¹⁷² Rather, he incorporated its reasoning into his "separation of powers" theory. Bork admitted that the Political Question Doctrine—and hence, its rationale—was not normally part of a federal court's attempt to discern a cause of action.¹⁷³ He accordingly invoked the doctrine under a "separation of powers" label, holding that a cause of action could not be inferred from ATCA. Bork essentially utilized an ill-fitting principle renamed to suit his purposes—a method of analysis courts are not required to follow.

Thus, separation of powers principles need not prevent federal tribunals from addressing cause of action issues. The following section examines why courts may therefore chose to infer a right to relief pursuant to ATCA.

168. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 789 (Edwards, J., concurring).

169. *Id.* at 799, 802 (Bork, J., concurring).

170. *Id.* at 790 (Edwards, J., concurring) (citing *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773-76 (1972) (Powell, J., concurring in judgment)). See also Lengel, *The Duty of Federal Courts to Apply International Law: A Polemical Analysis of the Act of State Doctrine*, 1982 B.Y.U. L. REV. 61, 99: "[T]he act of state doctrine, as it has been applied since the 1960's, is . . . a rule that has antiquarian origins and questionable validity. The act of state doctrine should be abolished."

171. BLACK'S LAW DICTIONARY 1043 (5th ed. 1979).

172. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 803 n.8 (Bork, J., concurring). See *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) ("Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry"); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976) ("The 'political question' doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.").

173. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 803 n.8.

2. *Do Factors Exist that Counsel Against Invoking Separation of Powers Concerns?* (a) *Human Rights*.—When the Second Circuit issued the *Filartiga* opinion, many commentators hailed it as a sorely needed advance in the human rights movement.¹⁷⁴ The decision, which did not require the inference of a separate and distinct cause of action, was consistent with the views of the Carter Administration. When *Filartiga* was before the courts, the executive branch strongly advocated human rights policies on an international scale, refusing economic aid to sovereigns violating certain human rights norms.¹⁷⁵ President Carter's March 1977 speech to the United Nations echoed the views of his administration when he declared:

The search for peace and justice also means respect for human dignity. All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business.¹⁷⁶

It was therefore not surprising when the executive department's amicus brief argued that the protection of fundamental human rights was of major importance and not exclusively confined to the political branches of government.¹⁷⁷ The *Filartiga* court obviously agreed.¹⁷⁸

The Reagan Administration, in contrast, has deemphasized human rights,¹⁷⁹ prompting harsh criticism by some scholars.¹⁸⁰ This

174. See Johnson, *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335 (1981) (*Filartiga* decision "is an important contribution to the growing weight of authority acknowledging the legal status of international standards governing basic human rights."); Schneebaum, *Human Rights in the Federal Courts: A Review of Recent Cases*, 44 U. PITT. L. REV. 287, 295 (1983) (*Filartiga* and analogous cases are an "exciting development"); but cf. Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 GA. INT'L & COMP. L. 311 (1981) ("The decision of the Second Circuit Court of Appeals in the *Filartiga* case will not stand as a landmark case with far-reaching implications for the development of international law.").

175. See, e.g., THE INTERNATIONAL DEVELOPMENT ASSISTANCE ACT OF 1979 S. REP. NO. 96-137, 96th Cong., 1st Sess. 13 (1979). This report stated:

[T]he Executive Branch has already taken action which will reduce or terminate assistance to Ethiopia, Pakistan, Afghanistan, and Nicaragua The Committee [on Foreign Relations] determined that human rights records and/or internal conditions which affect adversely the ability of the United States to implement development assistance programs . . . justified the recommendation to eliminate funding for programs in the Central African Empire, Guatemala, El Salvador and Paraguay.

Id.

176. Address by President Carter made to United Nations Representatives, Mar. 17, 1977, reprinted in 76 DEP'T STATE BULL. 329, 332 (1977) (cited with approval in *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 n.24 (2d Cir. 1980)).

177. See Petition, *supra* note 100, at 26.

178. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

179. See Johnson, *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335, 341 (1981); see generally Failure: The Reagan Administration's Human Rights Policy in 1983, in AMERICAS WATCH, HELSINKI WATCH, LAWYER'S COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS (1984) (criticism of Reagan Administration's stance on international human rights) [hereinafter cited as AMERICAS WATCH].

deemphasis does not, however, warrant the conclusion that the executive should oppose adjudication of alleged human rights violations of the type addressed in *Filartiga*. Current executive policies cannot ignore the need to maintain a leading role in discouraging heinous law of nations infractions against individuals. To advocate that federal courts should not hear claims alleging grievous human rights violations would be inconsistent with established executive policy and would adversely affect foreign relations.¹⁸¹ A 1983 Department of State report noted the importance of maintaining vigorous and consistent human rights policies that seek to

eliminate torture and brutality A foreign policy indifferent to these issues would not appeal to the idealism of Americans, would be amoral, and would lack public support. Moreover, these are pragmatic, not utopian, actions for the United States. Our most stable, reliable allies are democracies. Our reputation among the people in important countries that are dictatorships will suffer if we come to be associated not with liberty, but with despotism.¹⁸²

180. See, e.g., AMERICAS WATCH:

The Administration's approach to human rights is a dramatic departure from the past and ignores strong bipartisan Congressional support for human rights. Administration officials themselves recognized Congressional dissatisfaction with the change in policy as early as October, 1981. An October 27, 1981 State Department memo, approved by the Secretary of State, concluded that 'Congressional belief that we have no consistent human rights policy threatens to disrupt important foreign policy initiatives.'

Id. at 2.

181. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (Second Circuit favors civil liability because "humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest"); see also *infra* text accompanying note 182 (eliminating torture and brutality in United States' interest); Blum & Steinhardt, *supra* note 40, at 112 (discussion of federal government's amicus brief in *Filartiga*, which stated that failure to provide plaintiff with a right of action might considerably harm United States human rights foreign policy (citing Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) at 22-13)); AMERICAS WATCH (Reagan Administration's human rights policies not in United States' best interest).

182. U.S. Department of State, *Country Reports on Human Rights Practices for 1982* 7 (1983). Cf. Brief for the United States as Amicus Curiae, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) [hereinafter cited as Brief]. This brief, filed with the Supreme Court on January 30, 1985, argues that the *Tel-Oren* petition for a writ of certiorari should be denied. Brief at 14. But the Solicitor General did not indicate that the executive branch currently discourages adjudication of fundamental human rights issues. Rather, he argued that the writ should be denied for other reasons. First,

any arguable inconsistencies between the Second Circuit's approach to the alien tort statute in *Filartiga* and the approaches taken by the panel members in [*Tel-Oren*] either will be reconciled without the need for review by this Court or will ripen into a sharper conflict that would permit this Court to review the complex issues raised by the petition after they have been more fully analyzed by the lower federal courts.

Brief at 12.

This view is inconsistent with the Edwards and Bork opinions, which stated that the Supreme Court, not lower federal courts, needed to clarify ATCA's role. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 775 (Edwards, J., concurring); *id.* at 823 (Bork, J., concurring). Second, the Solicitor General argued that other factors might bar petitioners from successfully

Worldwide enforcement of human rights is dismal at best.¹⁸³ Transnational organizations have had little success in their attempts to prevent internationally proscribed abuses because their structure is "horizontally" based,¹⁸⁴ enabling some states to act in their own self-interest¹⁸⁵ when they violate the law of nations. One solution to this problem rests in using domestic courts as fora for redressing international human rights infractions of the *Filartiga* genre.¹⁸⁶ ATCA can provide aliens with a viable means of pursuing these

redressing their claim. These factors include lack of personal jurisdiction over Libya or the PLO, allegations that failed to link the National Association of Arab Americans and the Palestine Information Office to the terrorism in issue, and the effect of expiration of the applicable statute of limitations. Brief at 13-14.

The amicus brief also argued in a footnote that ATCA is "purely jurisdictional and cannot be interpreted either to mandate the creation of a federal common law of international tort or to authorize individuals to enforce in domestic courts private rights of action derived directly from customary international law." Brief at 11 n.11. Nevertheless, the Solicitor General did not minimize the importance of resolving the cause of action dilemma and noted that the Court may one day need to provide guidance on this issue. Brief at 8.

183. See Hoffman, *Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal*, 112 DAEDALUS 19 (1983) ("The [international legal] network is a very weak one" (emphasis in original)); Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317, 323 (1981) ("An effective universal system for redress of individual rights has yet to be fashioned"); Note, *The Application of International Human Rights in United States Courts: Customary International Law Incorporated Into American Domestic Law*, 8 BROOKLYN J. INT'L L. 207, 237-38 (human rights currently a "crisis").

184. Richard Falk effectively explained the influence of horizontal structuring in resolving transnational disputes:

The traditional formal requirements that govern the presentation of an international claim presuppose a basic deference to the state as the center of authority. Recourse to an international decision-maker (i.e., a vertical form of review) to determine the validity of a challenged exercise of jurisdiction is available only to the extent that the defendant State consents to such review. Thus, the availability of a vertical settlement to an international dispute involving jurisdictional competence itself depends upon a prior horizontal decision. A state is never required by international law to resort to a supranational decision-maker, except perhaps if it is involved in disputes concerning the maintenance of peace or if it is a party to a binding international agreement to submit the dispute.

R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 24-25 (1964). See also Note, *The Application of International Human Rights in United States Courts: Customary International Law Incorporated Into American Domestic Law*, 8 BROOKLYN J. INT'L L. 207, 237-38 (1982) (horizontal structure hinders human rights claims).

185. See Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609 (horizontal ordering involved "reciprocal enforcement"); Note, *The Application of International Human Rights in United States Courts: Customary International Law Incorporated Into American Domestic Law*, 8 BROOKLYN J. INT'L L. 207, 238 (1982) ("[T]he unworkable horizontal ordering of states is based on mutual self-restraint and self-interest.").

186. See Lengel, *supra* note 170, at 102 (domestic adjudication of disputes involving international law is beneficial in light of inadequacy of international judiciary); Schneebaum, *Human Rights in the Federal Courts: A Review of Recent Cases*, 44 U. PITT. L. REV. 287, 295 (1983) ("[T]he role of the [federal] judiciary does permit real optimism, because the existence of legal rights brings with it the possibility of legal enforcement"); Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307, 309 (1981) (states can exercise jurisdiction over "universal crimes, such as piracy, slavery, or . . . torture"); but see Hassan, *Have Constitution, Will Travel*, 10 HUM. RTS. 41, 45 (1982) ("Curing the nonexistence of an international mechanism to enforce a particular right by providing domestic jurisdiction misses the point altogether.").

claims in federal courts. If Bork's separation of powers rationale is adopted, however, use of the statute may be unreasonably restricted.¹⁸⁷ A cause of action will not be inferred under ATCA because human rights adjudications will be perceived as impermissible judicial activism subjecting federal courts to a myriad of politically sensitive alien tort suits. This form of judicial abdication ignores human rights concerns and fails to recognize the existence of limiting factors¹⁸⁸ that narrow ATCA's scope.

(b) *ATCA limiting factors*.—Judge Bork declined to infer a cause of action because he believed that “appellants’ construction of [ATCA was] too sweeping . . . [and] would authorize tort suits for the vindication of any international legal right.”¹⁸⁹ This assertion patently ignores Judge Kaufman’s implicit reasoning in *Filartiga*; the opinion suggested that torture was one of only a few human rights violations currently available for international prohibition under the law of nations.¹⁹⁰ By describing state actors committing torture as *hostis humani generis*, enemies of all mankind, Kaufman indicated that “the ultimate scope of [human] rights will be a subject for continuing refinement and elaboration.”¹⁹¹ This refinement, however, is limited to a small group of heinous, state-sponsored violations of fundamental human freedoms. The *Filartiga* court examined binding and nonbinding treaties and other transnational agreements to determine whether an act was so popularly proscribed that it merited the *hostis humani generis* label. In this manner, the Second Circuit expanded the list of law of nations offenses¹⁹² actionable under ATCA.

The *hostis humani generis* doctrine emerged long before Judge Kaufman utilized it in *Filartiga*. Blackstone’s *Commentaries*¹⁹³ contain considerable discussion on piracy, the offense best known as a *hostis humani generis* activity. Since the pirate had “reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right . . . to inflict . . . punishment upon him.”¹⁹⁴ The pirate was therefore punishable wherever he was caught due to the gravity of his offense against the world community. James Kent, in his *Commentaries on American Law*,¹⁹⁵ listed

187. Cf. Leigh, *Judicial Decisions*, 76 AM. J. INT’L L. 169, 171 (1982) (“If affirmed by the court of appeals, however, *Hanoch Tel-Oren* would severely limit access to federal courts in the District of Columbia for private human rights claims.”).

188. See notes 190-92 and accompanying text.

189. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 812 (Bork, J., concurring).

190. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

191. *Id.*

192. See *infra* text accompanying note 210.

193. 4 W. BLACKSTONE, *COMMENTARIES* (Sharswood ed. 1865).

194. 4 W. BLACKSTONE, *supra* note 193, at *71.

195. J. KENT, *supra* note 10.

additional characteristics that made pirates international outlaws; they were "everywhere pursued and punished with death . . . [T]he severity with which the law has animadverted upon this crime arises from its enormity and danger, the cruelty that accompanies it, and the necessity of checking it."¹⁹⁶ These criteria provide a useful analytical framework that can be analogously applied to determine if other activities render their perpetrators enemies of all mankind. Judge Kaufman, in bestowing this notorious title upon the torturer,¹⁹⁷ effectively applied the Kent test: The torturer, especially when a state actor, engages in a dangerous, internationally abhorred activity. Moreover, his undertaking is certainly cruel and must be penalized to deter its widespread use.

Bork, however, believed that expanding *hostis humani generis* offenses beyond piracy¹⁹⁸ would embroil the United States in international conflict.¹⁹⁹ He therefore contended the law of nations' scope should remain as it was in 1789 when ATCA was first enacted.²⁰⁰ Bork did not sufficiently weigh the viability of using the *hostis humani generis* standard as a limiting factor in discerning human rights violations under the law of nations. Relying upon his separation of powers justification, he argued that

a refusal by a United States court to hear a dispute between aliens is much less offensive than would be acceptance of jurisdiction and a decision on the merits. In the latter case, the state of the losing party would certainly be affronted, particularly where the United States' interests are not involved.²⁰¹

Bork did not adequately consider two factors that undermine this rationale. First, *hostis humani generis* offenses, because of their popular prohibition in the world community, would be unlikely to offend the state of the losing party sued pursuant to ATCA. A human rights violation makes the perpetrator an enemy of all mankind only when the large majority²⁰² of nations declare it illegal. Be-

196. *Id.* at 185.

197. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

198. Bork did not, however, contend that piracy was the exclusive law of nations prohibition, since two other crimes were internationally proscribed by 1789: violation of safe-conducts and infringement of the rights of ambassadors. But these latter offenses were not *hostis humani generis* violations. They were therefore not central to either Edwards' or Bork's analysis. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 813. See also 4 W. BLACKSTONE, *supra* note 193, at *68 (discussion of three law of nations offenses).

199. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 813 (Bork, J., concurring). Bork asserted that it was incorrect to believe the law of nations now contains "a rule . . . against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. [This] assertion raises prospects of judicial interference with foreign affairs" *Id.*

200. *Id.* at 812-14.

201. *Id.* at 821.

202. See *infra* notes 212-18 and accompanying text.

cause so many sovereigns proscribe the particular activity, very few would take offense if the United States fairly adjudicated the dispute.²⁰³ The modern torturer, moreover, would merely face the same risk as his piratical counterpart; he would be punishable anywhere, in accordance with Blackstone's and Kent's conception of the *hostis humani generis* doctrine. Indeed, other sovereigns might be offended if courts followed Bork's contention, because the United States would be perceived as ratifying *hostis humani generis* behavior. Second, it is incorrect to argue that "the United States' interests are not involved"²⁰⁴ when the defendant alien must be served with process there in order to be subject to federal court jurisdiction.²⁰⁵ Unless the defendant's presence in the United States is merely transitory,²⁰⁶ he is subject to the federal government's "legitimate interest in the orderly resolution of disputes among those within its borders."²⁰⁷

Bork's separation of powers rationale accordingly cannot withstand the contention that the law of nations may reasonably expand if its growth is limited to the inclusion of *hostis humani generis* offenses. His objections to inferring a cause of action pursuant to ATCA can therefore give way to the need to prevent human rights abuses²⁰⁸ contravening norms popularly proscribed by the international community.

What crimes, then, are likely to be considered violations of the law of nations? The debate surrounding the topic is complex and controversial,²⁰⁹ but it appears piracy, torture, summary execution,

203. See M. AKEHURST, *supra* note 41, at 104; Blum & Steinhardt, *supra* note 40, at 84:

Conceivably it could be argued that . . . for United States courts to exercise § 1350 [ATCA] jurisdiction over cases having no direct connection with the United States would offend deeply rooted notions of international comity.

As a matter of international law, however, this argument is weak for three reasons. It attempts first to derive from the abstract principle of comity a prohibition which has never existed as an obligatory rule in international law. Second, insofar as comity has been applied as a persuasive factor for domestic courts to decline jurisdiction, it has operated only in criminal cases and in civil cases where an authoritative judgment has been pronounced by another state's courts. Third, the existence of international human rights norms since 1945 renders largely obsolete the earlier generalizations about comity even for criminal cases Comity was . . . never a full-scale prohibitory norm.

Id.

204. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 821 (Bork, J., concurring).

205. See Blum & Steinhardt, *supra* note 40, at 113 (ATCA will discourage human rights violators from entering United States because they will be amenable to suit there).

206. See Rohlik, *Filartiga v. Pena-Irala: International Justice in a Modern American Court?*, 11 GA. J. INT'L & COMP. L. 325, 333 (1981).

207. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); see also Blum & Steinhardt, *supra* note 40, at 63 (in civil actions a state may resolve a dispute even if it arose overseas).

208. See *supra* notes 174-88 and accompanying text.

209. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 781 (Edwards, J., concurring); *id.* at 813 (Bork, J., concurring); RESTATEMENT (REVISED) OF THE LAW OF FOREIGN RELATIONS § 702 (Tent. Draft No. 3, 1982); Blum & Steinhardt, *supra* note 40, at 87-97; Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236,

slavery, genocide, and possibly terrorism are included in the canon of law of nations prohibitions.²¹⁰ All are popularly proscribed, as evidenced by numerous international agreements.²¹¹

But an important and largely unresolved issue is the exact method of determining how many nations must disfavor certain conduct before it is popularly proscribed. Two terms—"universal" assent and "general" assent—are often used to indicate the requisite number. Although some commentators use the terms synonymously,²¹² most perceive an obvious distinction: "universal" commonly means "pertaining to all without exception; a term more extensive than 'general,' which . . . may admit of exceptions."²¹³ If these terms are given their clear meaning, federal courts should hold that general, not universal, assent is required.²¹⁴ In *United States v. Smith*, the Supreme Court endorsed this method when it declared that "the law of nations . . . may be ascertained . . . by the *general* usage and practice of nations."²¹⁵

Although the *Filartiga* court's approach is consistent with the *Smith* precedent,²¹⁶ Edwards and Bork deviated from this principle in *Tel-Oren*. Both judges believed universal condemnation was required to label an activity a *hostis humani generis* offense.²¹⁷ This conception, under the strict definition of "universal," is contrary to common sense. Universal condemnation is highly unlikely to occur because the defendant state actor's sovereign will often condone the alleged law of nations violation.²¹⁸ General assent is therefore the workable—and hence the preferable—standard by which *hostis humani generis* offenses may be discerned.

Thus, the law of nations is not static. It is instead expanding cautiously, and can be restricted to emerging *hostis humani generis* norms determined by the general assent of nations. There is there-

242-47 (1982).

210. *Id.*

211. See *supra* notes 78-80 and accompanying text.

212. See, e.g., Blum & Steinhardt, *supra* note 40, at 89 (human rights norms must be "universal," commanding the "'general assent of civilized nations'" (quoting with approval *The Paquete Habana*, 175 U.S. 677, 694 (1900))).

213. BLACK'S LAW DICTIONARY 1376 (5th ed. 1979).

214. See The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945) (law of nations determined by general acceptance of nations); but see RESTATEMENT (REVISED) OF THE LAW OF FOREIGN RELATIONS § 404 (Ten. Draft No. 2, 1981) ("A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern . . .").

215. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820).

216. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (1980); see also *Petition*, *supra* note 100, at 10 (*Filartiga* uses "general assent" analysis).

217. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 781 (Edwards, J., concurring); *id.* at 807 (Bork, J., concurring); see also *Petition*, *supra* note 100, at 12-13 ("[T]he [*Tel-Oren*] court required unanimity of international opinion as a prerequisite to a finding that any act of a nation-state or its agent is in violation of international law.").

218. AKEHURST, *supra* note 41, at 31.

fore little merit to Bork's contention that inferring a cause of action would lead to a barrage of politically sensitive alien tort actions. Under a system of general assent, extending ATCA jurisdiction would be unlikely to offend most sovereigns whose nationals were losing parties because fair adjudications would redress only popularly proscribed activity. If a sovereign did object, however, federal courts could still adjudicate the dispute because only general, not universal, prohibition is required to render the alleged activity a law of nations infraction. The United States may accordingly demonstrate its abhorrence of *hostis humani generis* offenses by opening its courts pursuant to ATCA. Judicial abdication under a separation of powers rationale might "solve the problem for the court in a particular case; but in the long term it creates and fosters a system of international uncertainty."²¹⁹

C. *ATCA Cause of Action Inference Under the Cort Criteria*

The preceding section demonstrates that Judge Bork's tenuous separation of powers concerns are overshadowed by the need to infer an ATCA right to relief. Although a court can certainly hold that this inference is appropriate without using a well-established test to reach its conclusion, a useful analytical framework can be found in *Cort v. Ash*.²²⁰ The advantage of utilizing this test is its firm basis in precedent and its clear enumeration of factors justifying the inference of an ATCA cause of action.

*Cort v. Ash*²²¹ involved an attempt to enjoin certain corporate expenditures in the 1972 presidential election. The Supreme Court's opinion listed four criteria enabling courts to "determin[e] whether a private remedy is implicit in a statute not expressly providing one":²²²

First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?²²³

219. Lengel, *supra* note 170, at 101.

220. 422 U.S. 66 (1975).

221. *Id.*

222. *Id.* at 78.

223. *Id.* (citations omitted) (emphasis in original).

As Judge Bork commenced his *Tel-Oren* concurrence, he refused to use the *Cort* test²²⁴ because separation of powers concerns "counsel[ed] hesitation in the absence of affirmative action by Congress."²²⁵ Because of the governmental need²²⁶ to protect core human rights from *hostis humani generis* offenders, Bork's separation of powers rationale does not justify "hesitation."

Bork also argued that, because ATCA is contained in the Judicial Code,²²⁷ the Supreme Court's holding in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*²²⁸ forbade discerning an implied-cause of action.²²⁹ The *Montana-Dakota* Court stated that "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create²³⁰ causes of action, but only confers jurisdiction to adjudicate those arising from other sources"²³¹ Two points are relevant here. First, this quotation is dicta. Plaintiff in *Montana-Dakota* sought damages from defendant utility, which allegedly engaged in fraudulent deprivation of plaintiff's statutory right to reasonable rates and charges. Plaintiff alleged its right to relief emerged pursuant to "the Federal Power Act's requirement of reasonable electric utility rates."²³² As the Court approached the issue whether a cause of action was stated under the Federal Power Act, it noted in passing that the Judicial Code did not create rights of action.²³³ Second, this *Montana-Dakota* quotation must be viewed in light of the Court's later holding in *Textile Workers Union of America v. Lincoln Mills of Alabama*.²³⁴ The *Lincoln Mills* Court held that section 301 of the Labor Management Relations Act of 1947, a jurisdictional grant on its face, "is more than jurisdictional . . . it autho-

224. Judge Bork did not cite to *Cort v. Ash* directly. Rather, he discussed the inapplicability of *Davis v. Passman*, 442 U.S. 228 (1979), which derived its analytical framework from *Cort*. See *id.* at 232 n.8. In Bork's view, *Tel-Oren* presented "a question not covered by the analyses described by the *Davis* Court for statutory and constitutional causes of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 801 (Bork, J., concurring).

225. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 801 (Bork, J., concurring) (quoting *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

226. See *supra* notes 174-88 and accompanying text. See also Blum & Steinhardt, *supra* note 40, at 112 ("It is clear from public pronouncements and administrative actions in other contexts that the executive branch considers human rights obligations to be binding under international law.").

227. The "Judicial Code" is contained in Title 28, United States Code, and is formally titled "Judiciary and Judicial Procedure."

228. 341 U.S. 246 (1951).

229. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 811 (Bork, J., concurring).

230. Cf. *Dreyfus v. Von Finck*, 534 F.2d 24, 28 (2d Cir.), cert. denied, 429 U.S. 835 (1976), in which the court stated that ATCA "do[es] not create a cause of action for a plaintiff seeking recovery under a treaty, [but does] give the District Court power to determine whether, in a well pleaded complaint, a cause of action exists."

231. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951).

232. *Id.* at 250.

233. *Id.* at 249.

234. 353 U.S. 448 (1957).

rizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."²³⁵ This holding analogously provides an analytical framework permitting the inference of substantive causes of action from jurisdictional statutes in order to effectuate the intent of Congress.²³⁶ Accordingly, the *Cort* criteria are entirely applicable to disputes about inferring an ATCA right to relief. First, ATCA was inarguably created for the *especial* benefit of aliens seeking to institute tort actions in federal courts. The statute is a federal jurisdictional grant giving a district court the right to hear a tort claim that favors an alien plaintiff's attempts to redress his injury.²³⁷ Moreover, the Supreme Court elaborated that this criterion can be met when there exists "a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard."²³⁸ ATCA, as discussed earlier, was created to provide aliens with an avenue of tort redress in federal courts, largely because Congress desired to avoid state court adjudications involving foreign affairs,²³⁹ an area the federal government wished to pervade.²⁴⁰

Second, there exist *indications* of implicit congressional intent to create such a remedy. The preceding pages have discussed numerous arguments, including attempts to discern the intent of ATCA's framers²⁴¹ and the application of statutory construction principles,²⁴²

235. *Id.* at 450-51.

236. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The *Filartiga* court stated it was possible that ATCA could "be treated as an exercise of Congress's power to define offenses against the law of nations," and cited *Lincoln Mills* as authority for this proposition. But the court declined to apply the *Lincoln Mills* principle and instead cryptically stated it was "sufficient here to construe [ATCA], not as granting new rights to aliens, but simply as opening federal courts for adjudication of the rights already recognized by international law." *Id.* Judge Edwards, in his *Tel-Oren* concurrence, "construe[d] this phrase to mean that aliens granted substantive rights under international law may assert them under [ATCA]." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 780 n.5 (Edwards, J., concurring). Cf. Blum & Steinhardt, *supra* note 40, at 98-99, in which the authors note that judicial use of international law as incorporated into federal common law is "permissible under the *Lincoln Mills* principle, according to which a statute that is facially nothing more than a grant of jurisdiction can be read as impliedly authorizing the development of substantive federal common law, in order to effectuate the purpose of the statute." Although Blum & Steinhardt use *Lincoln Mills* in the context of a choice of law analysis, the creation of a cause of action, a substantive right, can occur in an analogous manner. See also Friendly, *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 413 (1964) (*Lincoln Mills* enables courts to fashion federal common law).

237. Note that the "right" need not rest in plaintiff, but must only "favor" plaintiff. See *supra* text accompanying note 223.

238. *Cort v. Ash*, 422 U.S. 66, 82 (1975).

239. See *supra* text accompanying note 17.

240. A legislative scheme "pervades" an area of the law when it is "abundant or prevalent throughout." WEBSTER'S NEW WORLD DICTIONARY 1093 (College ed. 1953). Thus, federal law need not *exclusively* govern a legislative area to be "pervasive" under the *Cort* test. It is also interesting to note that the Court did not indicate that "pervasive" was synonymous with "preemptive." See *Cort v. Ash*, 422 U.S. at 82.

241. See *supra* text accompanying notes 17-25.

242. See *supra* notes 141-53 and accompanying text.

which indicate implicit congressional intent to create a private cause of action for aliens invoking the statute. Moreover, the Court clearly noted that showing an intention to create a right to relief was not necessary if it is "clear that federal law has granted a class of persons certain rights."²⁴³ The law of nations is federal law,²⁴⁴ granting alien plaintiffs the right to be free of *hostis humani generis* offenses including piracy²⁴⁵ and torture.²⁴⁶ Federal law also allows redress for violation of safe conducts²⁴⁷ and infringement of the rights of ambassadors.²⁴⁸ The federal government has a clear interest in aliens as a class and provides these remedies to keep alien tort claims out of state courts.²⁴⁹

Third, inferring a cause of action pursuant to ATCA is consistent with the underlying purpose of encouraging alien plaintiffs to seek relief in a federal forum. This inference promotes the national government's control over actions "potentially implicating foreign affairs,"²⁵⁰ for "[s]ubject to the same constraints that face federal courts, such as personal jurisdiction, and perhaps in some instances to other limitations, such as preemption, state courts could hear many of the common law civil cases . . . brought by aliens."²⁵¹

Finally, an alien's right to relief does not rest in state law, but must be found, in this instance, either in ATCA itself or in the law of nations as discerned pursuant to this statute. It is therefore entirely appropriate to infer a right to relief.

Although the *Cort* test is not the exclusive way to infer an ATCA cause of action, it clearly enumerates the criteria necessary to discern the congressional intent informing the statute. The test is especially useful if courts interpret ATCA as impliedly *embodying* a right to relief, or as containing implied *authority to discern* one in the law of nations.²⁵² This construction effectively harmonizes the contravening Edwards and Bork views about where a cause of action must be found, and permits the court to inquire whether inferring a cause of action is desirable and consistent with congressional intent. The test is not a panacea, for courts must still construe ATCA's language and scan meager legislative history to satisfy the four ele-

243. *Cort v. Ash*, 422 U.S. at 82. Note that "federal law" is more than a single statute undergoing application of the *Cort* criteria; it is a "legislative scheme." See *id.*

244. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 810 (Bork, J., concurring) (citing *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)).

245. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

246. *Id.*

247. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 813-14 (Bork, J., concurring).

248. *Id.*

249. *Id.* at 813-16.

250. *Id.* at 790 (Edwards, J., concurring).

251. *Id.*

252. See *supra* note 140 and accompanying text.

ments in the *Cort* formula. This is not surprising or undesirable. The *Cort* test allows federal tribunals to construe ATCA to serve present needs—without abandoning the aims of its framers.

V. Conclusion

Tel-Oren highlights the need for Supreme Court guidance on ATCA's role in human rights litigation. Unless the Court determines whether a cause of action should be inferred pursuant to ATCA, federal tribunals will lack a clear standard enabling them to determine if resort to the statute is appropriate. Until that time, courts must examine whether Judge Bork's separation of powers rationale justifies a refusal to infer an ATCA right to relief. Bork's arguments should not withstand this scrutiny.

Bork's fear of judicial activism ignores the United States' interest in deterring state sponsored human rights atrocities proscribed by the world community. If courts refuse to hear alien claims alleging internationally prohibited torts of the *Filartiga* genre, American foreign policy will appear inconsistent and indifferent to fundamental human freedoms. ATCA's scope may reasonably expand if the law of nations grows to encompass only *hostis humani generis* offenses. This cautious delineation of unlawful behavior undermines Bork's assertion that district courts will be flooded with diplomatically sensitive alien tort actions. Moreover, use of ATCA as a means of redress will not offend most sovereigns because *hostis humani generis* infractions are forbidden by the large majority of nations.

Because Bork's separation of powers concerns are outweighed by the need to promote carefully circumscribed human rights policies, federal courts may infer an ATCA right to relief. This inference may be made directly or by use of the *Cort* criteria. The *Cort* test is advantageous because it is firmly based in precedent and concisely lists factors justifying the inference of an ATCA cause of action. But applying the *Cort* formula has an additional advantage: it provides courts with a rational method of construing a statute which, when given effect, "is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."²⁵³

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253. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (1980).

